

CHUGACH ALASKA CORP. (ON RECONSIDERATION)

IBLA 94-473R

Decided June 19, 1998

Petition for reconsideration of Board's decision in Chugach Alaska Corp., 140 IBLA 323 (Oct. 7, 1997), vacating the April 24, 1994, decision of the Alaska State Office, Bureau of Land Management, rejecting as untimely filed seven applications of Chugach Alaska Corporation (Chugach) for historical or cemetery sites. AA-41487, etc.

Petition granted; previous Board decision vacated; BLM decision vacated on other grounds; case remanded for referral of waiver request to Secretary.

1. Administrative Authority: Generally--Board of Land Appeals--Bureau of Land Management--Rules of Practice: Appeals: Reconsideration

Where the BLM shows on reconsideration that it lacks authority to grant a waiver of untimeliness of cemetery site and historical place applications under 43 C.F.R.

§ 2650.0-8 as directed by a Board of Land Appeals decision because authority to enforce that regulation has not been delegated to BLM by the Secretary, BLM's petition for reconsideration is properly granted and the Board's decision is properly vacated, as the Board also lacked authority to adjudicate or direct BLM to grant such request for waiver.

2. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places--Bureau of Land Management

It is gross error for BLM to reject cemetery site and historical place applications as untimely where there is pending within the Department a request for waiver of the untimeliness of those applications, and BLM is aware of that fact. A decision so doing is properly vacated and the matter remanded with instructions that BLM forward the pending request for waiver to a party in the Department who is authorized to rule on it and, following adjudication of the waiver request, that BLM readjudicate the applications.

APPEARANCES: William P. Horn, Esq., and Douglas S. Burdin, Esq., Washington, D.C., for Chugach Alaska Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Alaska State Office, Bureau of Land Management (BLM or Bureau), has filed a timely Petition for Reconsideration (Petition) of the October 7, 1997, decision of this Board in Chugach Alaska Corp., 140 IBLA 323 (1997), wherein we vacated BLM's decision rejecting as untimely filed seven applications of Chugach Alaska Corporation (Chugach) for historical or cemetery sites under section 14(h)(1) of Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1994).

Chugach's applications, filed on January 24, 1980, were accompanied by a request pursuant to 43 C.F.R. § 2650.0-8 to waive the filing deadline for selection applications. The Bureau did not rule on the request for waiver or forward the waiver to the Secretary for adjudication. Instead, it proceeded to investigate the substance of those applications, although it eventually issued its decision rejecting them solely because they were not timely filed. No express ruling on the waiver was ever made, although it was denied, sub silentio, when BLM denied the selection applications.

The regulation governing the waiver, 43 C.F.R. § 2650.0-8, provides: "The Secretary may, in his discretion, waive any nonstatutory requirement of these regulations. When the rights of third parties will not be impaired, and when rapid, certain settlement of the claims of Natives will be assisted, minor procedural and technical errors should be waived." We held in our decision that, by failing to respond negatively to Appellant's 1980 request for a waiver, and by substantively adjudicating its applications over the years, BLM effectively waived the filing deadline, and directed BLM on remand to issue a decision addressing the merits of Appellant's selection applications. Chugach Alaska Corp., 140 IBLA at 327.

The Bureau objects to our characterization of the "1982 CNI Settlement Agreement" as "irrelevant." Chugach Alaska Corp., 140 IBLA at 326 n.3. It states in its Petition that the "CNI Agreement expressly prohibits Chugach for applying for or seeking any waiver to make future 14(h)(1) selections or to `... assert or seek any other legal authority to make future selections pursuant to 14(h) of ANCSA within the national forests." Although it asserts that the CNI Agreement was "a comprehensive settlement of Chugach's ANCSA land entitlement," thereby implying that Chugach agreed to give up all pending claims as of the date of the agreement, BLM cites no language explicitly so providing, and Chugach strenuously asserts that there is no such language in the agreement. Thus, BLM fails to confront the fact that Chugach had already applied for and sought a waiver to make these seven applications as of the date of the agreement. We cannot agree

that the cited language, addressing Chugach's right to make future selections, governs the 1980 request for waiver. The agreement is "irrelevant" because, by its own terms, it does not govern the 1980 waiver request. The Bureau's Petition is expressly denied on this ground.

The Bureau points out that there has been no consideration of "potential impairments of third party rights." We agree with Chugach that BLM should have brought any such impairments to our attention during consideration of its appeal. In any event, the only relevant impairments would be those existing in January 1980, when Chugach filed its request for relief. Any other equities that may have arisen are the result of the Department's failure to timely address Chugach's request for relief. As BLM does not set out in its Petition impairments of third party rights at the relevant time (in January 1980), it provides no basis to disturb our decision, even if BLM's failure to raise the point during our consideration of the appeal could be overlooked. The Bureau's Petition is also expressly denied on this ground.

[1] The Bureau advises us for the first time in its Petition that "the Secretary has not delegated [to BLM] the authority to waive certain nonstatutory regulations to BLM," including 43 C.F.R. § 2650.0-8, so that BLM lacks authority to carry out the action we directed in Chugach Alaska Corp., supra. It follows that this Board also lacked authority in this case to adjudicate or direct BLM to grant Chugach's 1980 request for waiver, as its authority over substantive matters in the context of appeals, while a direct grant from the Secretary, is nevertheless limited to reviewing determinations properly within BLM's jurisdictional purview. Thus, we agree that BLM lacks authority to comply with our decision insofar as it directs BLM to grant a waiver of the untimeliness of Chugach's application. In these circumstances, it is appropriate to grant BLM's Petition and vacate our decision.

[2] However, if BLM had no authority to adjudicate the request for waiver, it also cannot deny it. More importantly, its rejection of Chugach's application as untimely prior to the adjudication of a pending request for waiver of the untimeliness (when it was aware of that pending waiver request) was gross error, in view of the availability of that remedy under the regulations and the pendency of that request. Accordingly, BLM's April 19, 1994, decision is hereby vacated.

The Bureau is directed to forward Chugach's still pending request for waiver to the appropriate party in the Office of the Secretary having authority to adjudicate that request. Following such adjudication, BLM shall readjudicate the validity of Chugach's selection applications.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Petition for Reconsideration is granted; our decision in Chugach Alaska Corp., supra

is vacated; BLM's April 19, 1994, decision is vacated; and the case is remanded with instructions to refer Chugach's request for waiver to the Office of the Secretary for adjudication.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge